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IN THE

Supreme Court of the United States

October Term, 1957

No.

YVETTE J. MADSEN, *Petitioner*

v.

WINFRED OVERHOLSER, Superintendent of Saint Elizabeths Hospital, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States, Petitioner respectfully shows:

OPINIONS BELOW

The opinion of the District Court and the *per curiam* opinion of the Court of Appeals are contained in the transcript of the record. (R. 24-29; Appendix 1a)

Neither Court considered the constitutional questions or the effect of the *Reid* decision upon this case. On January 16, 1958, the Court of Appeals held that it was bound by this Honorable Court's opinion in *Madsen* v. *Kinsella*, 343 U.S. 341, although the constitutional questions presented in the current proceedings were not then raised or decided.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, U.S. Code.

QUESTIONS PRESENTED

The questions on appeal by Petitioner may be stated to be:

1. May a civilian dependent wife of an American serviceman be tried overseas for a capital offense before a military commission?

2. Does such military proceeding without indictment and without a jury trial before a civilian court, deprive the accused civilian of constitutional and legislative guarantees?

3. Is a military trial of a civilian dependent for a capital offense committed in Germany after termination of the occupation, constitutionally authorized as an exercise of "war powers"?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States of America

Article III, § 2, ¶ 3. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said

Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Amendment Article V—"No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . .".

Amendment Article VI—"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

The Articles of War

"Article 2. [Successor statute, UCMJ Art. 2] **Persons Subject to Military Law.**—The following persons are subject to these Articles . . ."

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;"

"Article 15. [Successor statute, UCMJ Art. 21] **Jurisdiction Not Exclusive.**—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or *offenses that by statute or by the law of war* be triable by such military commissions, provost courts, or other military tribunals." (Italics Added)

SUMMARY STATEMENT OF MATTER INVOLVED

Petitioner is a native born, American citizen. In October, 1949, she was the civilian dependent wife of an American serviceman, accompanying her husband while he was stationed in Germany. At that time, she was charged with a capital offense in violation of German law, and in February, 1950, tried and sentenced by the United States Military Authorities in Germany. There existed no "statute" of the United States or recognized rule of the "law of war" making her amenable to military jurisdiction. The asserted power was said to stem from alleged courts-martial jurisdiction over her—a jurisdiction which this Honorable Court recently held was non-existent in capital cases.

At the time of the commission of the alleged offense and the subsequent trial, more than four years had elapsed since defeated Germany had surrendered. U. S. Military Government in Germany had already terminated, and Germany was governing itself—subject only to certain reserved powers vested in the Allied High Commission. Petitioner contends she was denied her constitutionally guaranteed rights to indictment by Grand Jury, to trial by a jury, and to trial by an Article III Court.

In her earlier application for a writ of habeas corpus she contended that she should not have been tried by the executively created military tribunal, which this Honorable Court characterized as one, "in the nature of a military commission", but rather that she should have been tried by the legislatively created court-martial (*Madsen* v. *Kinsella,* 343 U. S. 341). Such tribunal is at least governed by the Articles of War (now the Uniform Code of Military Justice) and the

manual for courts-martial whereas the military commission is governed by military decree alone. *In re Yamashita,* 327 U. S. 1, 20.

The constitutional questions raised on this application for a writ of habeas corpus were not presented on the earlier application since the then applicable decisions appeared to permit trial of civilians by military courts under certain circumstances. Such rule was changed, at least in so far as capital cases are concerned, when this Honorable Court decided, on rehearing, *Reid* v. *Covert* and *Kinsella* v. *Krueger,* 354 U. S. 1. Petitioner now seeks her release by habeas corpus, relying upon that decision.

In the *Reid* case, this Honorable Court held that the legislative grant of power to the military authorities to try civilian dependents for a capital offense overseas by a court-martial was unconstitutional and that civilians may not, within the framework of the U. S. Constitution be tried by such military court for a capital offense. Petitioner contends that her trial by executive court "in the nature of a military commission", was violative of Article III of the Constitution as well as the Fifth and Sixth Amendments. Although these constitutional questions were not raised on the previous proceedings for the writ of habeas corpus, Petitioner is not barred from raising them now since a judicial determination in habeas corpus is not res judicata. *Waley* v. *Johnson,* 316 U.S. 101, 105; *Dowd* v. *Cook,* 340 U.S. 206, 208.

THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The present case involves the interpretation and effect of the decisions of this Honorable Court made subsequent to its decision in *Madsen* v. *Kinsella,* 343

U.S. 341. They appear to be in conflict and need to be clarified. Posed are questions involving interpretation of Constitutional provisions and the effectiveness of those provisions when considered in conjunction with Amendments V and VI and other sections of the Constitution. This case also involves proper interpretation of certain provisions of the Uniform Code of Military Justice and the extent of military jurisdiction over civilians accompanying the Armed Forces in capital cases.

ARGUMENT IN SUPPORT OF PETITION FOR THE WRIT OF CERTIORARI

In *Madsen* v. *Kinsella,* 343 U.S. 341, this Honorable Court sustained the jurisdiction of the military tribunal before which Petitioner was tried. Mr. Justice Black dissented. In said case, Petitioner's argument was that only courts-martial, which Congress had created, had jurisdiction to try her for a capital offense and that a military commission, which is an executive court and which functions in accordance with military dictates alone, did not have jurisdiction. All the decided cases until *Reid* v. *Covert* held that courts-martial had jurisdiction over civilians falling within Article of War 2. The whole point on Petitioner's first application, was that courts-martial had *exclusive* jurisdiction and that the military commission, which did try her, had no jurisdiction. The Respondents contention was that said tribunals had concurrent jurisdiction and that the military authorities alone could determine which to use. The propriety of trial before any military tribunal was raised for the first time in this *habeas corpus* proceeding in view of the recent ruling by this Honorable Court holding that civilians

may not constitutionally be tried by military authority for a capital offense and that only an Article III Court may exercise such jurisdiction.

In the first *Madsen* case, 343 U.S. 341, this Honorable Court held that Congress by AW 2(d) had granted jurisdiction over certain civilians to courts-martial and that Congress by AW 15 had also recognized jurisdiction of ". . . military commissions, provost courts, or other military tribunals . . .". Such ruling was adhered to in the first *Reid* v. *Covert* decision. It was changed only after a rehearing had been granted and this Court considered the constitutional questions which are now also raised by Petitioner.

The final decision in the *Reid* v. *Covert* and *Kinsella* v. *Krueger* cases held unconstitutional the Congressional grant of jurisdiction to *courts-martial* under UCMJ, Article 2 (successor section to AW 2(d) of the 1949 Code). It follows that any alleged grant of power to *military commissions* must likewise be held unconstitutional.

Mr. Justice Clark said in his and Mr. Justice Burton's dissenting opinion:

> "In upholding the constitutionality of trial by military commission [in the first *Madsen* case], we pointed out that its jurisdiction was concurrent with that of the military courts martial, 343 U.S., at 345, and that the jurisdiction of both stemmed directly from Article 2(d)." (354 U.S. 1, 81)

In holding UCMJ, Art. 2 unconstitutional, this Honorable Court, of logical necessity, had to find UCMJ, Article 21 (successor paragraph to AW 15 of the 1949 Code) unconstitutional. UCMJ, Article 21 reads:

> "The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals."

If Congress could not constitutionally authorize the trial of civilian dependents for a capital offense overseas by courts-martial, it certainly could not constitutionally authorize the trial of civilian dependents for a capital offense overseas by a military commission, provost court, or other military tribunal.

Since Petitioner was tried and sentenced by military authority before a "tribunal in the nature of a military commission", and since such tribunal could not constitutionally exercise jurisdiction, her release should have been ordered.

The jurisdiction of "The United States Court of the Allied High Commission for Germany, Fourth Judicial District" to try and sentence Petitioner in violation of her constitutionally guaranteed rights can not be justified as an exercise of "war powers".

Mr. Justice Black said, in his opinion in which The Chief Justice, Mr. Justice Douglas, and Mr. Justice Brennan joined:

> "There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces "in the field" during *time of war.* To the extent that these cases can be justified, insofar as they involved trial of persons who were not "members" of the armed forces, they must rest on the

> Government's "war powers". In the face of an actively hostile enemy, military commanders necessarily have broad power, over persons on the battle-front. [In February, 1950, when Mrs. Madsen was tried, over four years had passed since the Germany Army had surrendered] . . .the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules. But neither Japan nor Great Britain could properly be said to be an area where active hostilities were under way at the time Mrs. Smith and Mrs. Covert committed their offenses or at the time they were tried . . ."

Mr. Justice Clark, with whom Mr. Justice Burton joined, in his dissenting opinion said:

> "And in 1949, Germany, after four years of peaceful and uneventful occupation, could hardly be considered an area where Congress could act only under its War Power." (354 U.S. 1, 82)

Mr. Justice Black continuing said:

> "The exigencies which have required military rule on the battlefronts are not present in areas where no conflict exists. Military trial of civilians "in the field" is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights. We agree with Colonel Winthrop, an expert in military jurisdiction, who declared: "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace*"." (354 U.S. 1, 33-35)

In Germany, in October 1949 when the offense here involved was allegedly committed, and in February 1950 when the trial was conducted, there was no actively

hostile enemy. There was no battlefront. There was no area of actual fighting. There was not even a military occupation. Sovereign powers had been restored to the German people with certain reserved functions to be exercised by the Allied High Commission. Where then is the distinction between this case and the *Covert-Krueger* cases? Mr. Justice Black himself said:

> "... we reject the Government's argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are underway." (354 U.S. 1, 35)

Continuing, in footnote 63, he said:

> "*Madsen* v. *Kinsella,* 343 U.S. 341, is not controlling here. It concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with the Army or not."

This reference to the *Madsen* case, contained in footnote 63, is an error. It appears to have been taken from the Brief of Appellant on rehearing in the *Reid* v. *Covert* case. Germany was not being governed by our military forces in October 1949, when Mrs. Madsen's alleged offense was committed or in February 1950, when her trial took place. Military government had terminated before this time. Germany was governing itself under the so-called Occupation Statute, subject only to certain powers reserved to the Allied High Commission. Mr. Justice Frankfurter and Mr.

Justice Harlan, each of whom wrote opinions holding that the military authorities were without jurisdiction did not concur in what was said in footnote 63. Mr. Justice Clark and Mr. Justice Burton affirmatively disagreed with footnote 63. Mr. Justice Black, to whose opinion this footnote is appended, dissented in the prior *Madsen* case holding that the military authorities had no jurisdiction over her. Said footnote appears to be inconsistent with Mr. Justice Black's earlier views as expressed in said dissenting opinion.

It should be noted that the pleadings in this present case allege that "a state of peace existed between the government of the United States and the Federal Republic of Germany. Military government and occupation of Germany, as such, had ceased. . . ."[1] These allegations were not denied in the respondent's return and answer and are therefore admitted facts.

It is true that certain units of the U. S. Military Establishment were still in parts of Germany at the

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[1] Paragraph 4 of the petition for writ of habeas corpus reads: "That at the time of the commission of the offense charged, as well as at the time of the arrest, the trial, conviction and sentence and throughout the entire period referred to in the preceding paragraphs, a state of peace existed between the government of the United States and the Federal Republic of Germany. Military government and occupation of Germany, as such, had ceased to exist on April 1, 1949. Germany, more particularly the place where the offense is alleged to have been committed and where the trial of the Petitioner took place was not occupied territory and was not governed by the United States Military Forces but by the German Federal Republic and the Federal States of Germany which were vested with full legislative and judicial powers. German sovereignty had been restored and the German government was exercising its governmental powers over the area."

time of Mrs. Madsen's trial but so is it true that certain units of the U. S. Military Establishment were in Great Britain at the time of Mrs. Covert's offense, and in Japan at the time of Mrs. Smith's offense. Also, it is true that no formal Treaty of Peace had been signed between the Allied Powers and Germany but that does not mean that hostilities were continuing or that our occupation was continuing. The fact is that the occupation had terminated and the Allied High Commission had come into being. Even the name "Military Government Courts" was abolished because there was no longer any military government or occupation. The so-called "Allied High Commission Courts" were established but such courts lacked power to try American civilians for a capital offense in violation of constitutional guarantees and United States statutory safeguards.

In certain cases jurisdiction of military commissions has been sustained after the cessation of hostilities and after the signing of a treaty of peace but in none of those cases was an American civilian charged with a capital offense and all those cases were decided before the recent decision in *Reid* v. *Covert*.[2]

The fact is that in October, 1949, and in February 1950, The United States and Germany were not "at war"; The United States was not, either through its Congress or through its Executive, even in his capacity as Commander-in-Chief, exercising "War Powers" in

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[2] *Santiago* v. *Nogueras*, 214 U.S. 260, involved title to land; *Neeley* v. *Henkel*, 180 U.S. 109, involved a non-capital offense; *Burke* v. *Miltenberger*, 19 Wall. 519, involved title to land; *Leitensdorfer* v. *Webb*, 20 How. 176, involved merchandise; and *Cross* v. *Harrison*, 16 How. 164, involved the validity of a customs levy.

Germany and Germany was, for all practical purposes, exercising full sovereignty.[3]

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[3] *Chronological list of Events:*

4, 7, and 8 May 1945, German Army unconditionally surrenders.

8 May 1945, President Truman proclaimed the German final and unconditional surrender.

Early in 1946, in Germany, under military occupation, representative councils were elected at the local level and later at state levels.

6 September 1946, Secretary of State Byrnes' speech on U.S. policy in Germany, concluded:

"The American people want to return the government of Germany to the German people. The American people want to help the German people to win their way back to an honorable place among the free and peace-loving nations of the world."

30 September 1946, Military Governor directive:

"1. U.S. policy requires that the German people be permitted increasingly to govern themselves."

2 December 1946, Bi-zonal fusion U.S. and U.K. zones.

31 December 1946, Presidential Proclamation 2714, proclaims the termination of hostilities.

1 March 1947, Military Governor Proclamation. No. 4.

". . . redefining and substantially limiting the broad powers reserved to Military Government . . ."

10 March 1947-24 April 1947, Moscow session Council of Foreign Ministers failed to unify Germany and failed to agree to a peace conference.

27 March 1947, U.S. Military Government Regulations, Title 5, Part 4:

"Operation of the German judicial system is the task of German authorities."

25 November 1947-16 December 1947, London session Council of Foreign Ministers failed to agree on terms of German Peace Treaty.

9 February 1948, Military Government Proclamation No. 8:

"Establishment of a German High Court for the combined economic (US-UK) area".

23 February 1948-2 June 1948, London 6 Powers Conference (United States-United Kingdom-France-Belgium-Luxembourg-Netherlands).

Recommended integration of Germany into Western Europe.

No legal distinction exists between the *Reid* v. *Covert* and *Kinsella* v. *Krueger* cases on the one hand and this case on the other. If, under the constitution, Mrs. Covert and Mrs. Smith could not be tried by military authority for a capital offense, then under the same

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20 March 1948 Soviet Delegate (Chairman) Allied Control Council declared:
Meeting "closed".
3 April 1948, ECA announces:
"Western Germany included in Eurpean Recovery Program".
1 July 1948, "Soviet representatives will no longer participate . . ."
14 July 1948, Bi-zonal Board Agreement:
"Adherence to Foreign Assistance Act".
August 1948, Law establishing Parliamentary Council "to prepare, adopt, and submit a uniform basic law for all Western Germany".
14 September 1948, Agreement between U.S. and other nations for "most favored nation" treatment of West Germany under military occupation.
8 April 1949, Washington Three Power meeting Communique:
"Military government as such will be terminated, . . ."
8 April 1949, Tri-zonal fusion announced and occupation statute proclaimed ". . . the German people shall enjoy self-government to the maximum possible degree consistent with such occupation."
28 April 1949, Address by Secretary Acheson:
". . . Military Government will be terminated . . ."
15 May 1949, President Truman accepts resignation of General Clay as Military Governor.
18 May 1949, President Truman nominates (and sends to Senate for ratification) J. J. McCloy as High Commissioner of Germany.
23 May 1949, Basic Law for Federal Republic of Germany is proclaimed.
6 June 1949, Executive Order 10062 establishes HICOG [High Commissioner of Germany].
22 July 1949, Announcement of "military government transfer of control of broadcasting stations to German authority."
14 August 1949, Election of deputies to German Federal Parliament.

constitution Mrs. Madsen could not be tried by military authority for a capital offense. To hold otherwise is to deny her the equal protection of the laws.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH S. ROBINSON
DAYTON M. HARRINGTON
Counsel for Petitioner

Feb. 17, 1958

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21 September 1949, Statement of Acting Secretary of State, James E. Webb:
"Effective September 21, 1949 the military government of the United States Zone of Germany (Omgus) was terminated . . ."
21 September 1949, Council of Allied High Commission declares the occupation statute entered into force.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14130

YVETTE J. MADSEN, APPELLANT

v.

WINFRED OVERHOLSER, Superintendent of Saint Elizabeths Hospital, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided January 16, 1958

Mr. Joseph S. Robinson, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Mr. Dayton M. Harrington* was on the brief, for appellant.

Mr. Carl W. Belcher, Assistant United States Attorney, with whom *Messrs. Oilver Gasch*, United States Attorney, and *Lewis Carroll*, *George H. Foster, Jr.*, and *Alfred Burka*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, *Chief Judge*, and FAHY and DANAHER, *Circuit Judges*.

PER CURIAM: Appellant, then an Army wife in Germany, was convicted of murdering her husband. She has served only part of her sentence and is now a mental patient in St. Elizabeths Hospital. She contends her conviction and sentence were invalid and asks release in

habeas corpus. In a previous habeas corpus case, *Madsen* v. *Kinsella*, 343 U.S. 341, the Supreme Court sustained her conviction and sentence. She asks us to treat that decision as overruled by *Reid* v. *Covert* and *Kinsella* v. *Krueger*, 354 U.S. 1. But we deem ourselves bound by the Supreme Court's decision in the *Madsen* case itself.

Affirmed.

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No. 792

In the Supreme Court of the United States

OCTOBER TERM, 1957

YVETTE J. MADSEN, PETITIONER

v.

WINFRED OVERHOLSER, SUPERINTENDENT OF SAINT ELIZABETH'S HOSPITAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
W. WILSON WHITE,
Assistant Attorney General,
HAROLD H. GREENE,
Attorney,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

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YVETTE J. MADSEN, PETITIONER

v.

WINFRED OVERHOLSER, SUPERINTENDENT OF SAINT ELIZABETH'S HOSPITAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is not yet reported. The memorandum opinion of the District Court is not yet reported (R. 34).

JURISDICTION

The judgment of the Court of Appeals was entered January 16, 1958. The petition for a writ of certiorari was filed on February 18, 1958. On the same day, petitioner filed a Motion for Leave to File and Petition for Reconsideration in No. 411, *Yvette J. Madsen* v. *Nina Kinsella,* October Term, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether United States military courts have jurisdiction, in an area conquered and governed by American military forces, to try the civilian wife of a United States serviceman for murdering her husband.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States—

> Article I, Sec. 8: The Congress shall have Power * * * To declare War * * * To raise and Support Armies * * * To make Rules for the Government and Regulation of the land and Naval Forces * * *.
>
> Article II, Sec. 2: The President shall be Commander in Chief of the Army and Navy of the United States * * *.
>
> Article III, Sec. 2, clause 3: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.
>
> Amendment, Article V—No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; * * *.
>
> Amendment, Article VI—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

The pertinent provisions of the Articles of War, as amended by the Act of June 4, 1920, c. 227 subch. II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627, provided as follows:

> Art. 2 [10 U. S. C. (1946 ed.) 1437]. Persons subject to military law.
>
> The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law", or "persons subject to military law", whenever used in these articles: * * *.
>
> * * * * *
>
> (d) All retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;
>
> * * * * *
>
> Art. 12 [10 U. S. C. (1946 ed.), Supp. IV, 1483]. General courts martial.
>
> General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals * * *.
>
> Art. 15 [10 U. S. C. (1946 ed.) 1486]. Jurisdiction not exclusive.
>
> The provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions,

provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Art. 38 [10 U. S. C. (1946 ed.), Supp. IV, 1509]. President may prescribe rules.

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided,* That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further,* That all rules and regulations made in pursuance of this Article shall be laid before the Congress.

STATEMENT

Petitioner, the civilian wife of an American serviceman in Germany, was charged in October, 1949, with murdering her husband, in violation of a provision of the German Criminal Code. She was tried by the "United States Court of the Allied High Commission for Germany, 4th Judicial District," found guilty, and sentenced to imprisonment for a term of fifteen years (R. 1). While serving this sentence in the Federal Reformatory for Women at Alderson, West Virginia, she petitioned for a writ

of habeas corpus. The petition was dismissed, *Madsen* v. *Kinsella,* 93 F. Supp. 319 (S. D. W. Va.) and the dismissal was sustained by the Court of Appeals (188 F. 2d 272 (C. A. 4)), and by this Court (343 U. S. 341).

Thereafter, petitioner became a patient and United States prisoner at Saint Elizabeth's Hospital in the District of Columbia, and on August 9, 1957, she again petitioned for a writ of habeas corpus. In this new petition she alleged that, at all times relevant to the case, a state of peace existed between the United States and Germany, and that military government and the occupation of Germany, as such, had ceased to exist. She further stated that in view of these circumstances, and on the basis of the recent decision of this Court in *Reid* v. *Covert,* 354 U. S. 1, she was entitled to immediate release,[1] inasmuch as her continued confinement constituted a violation of her constitutional rights (R. 2–4).

In his Return and Answer to the Rule to Show Cause, respondent quoted from opinions of the District Court and of this Court in the earlier habeas corpus proceeding involving petitioner, to the following effect: On September 21, 1949, a so-called Occupation Statute took effect in Western Germany, creating an Allied High Commission to replace the Office of Military Government. Law No. 1 of the United States High Commissioner, effective January 1, 1950, replaced the courts known as Military Gov-

[1] The record is not entirely clear as to whether her confinement would not be justified, in any event, on the ground that she is presently insane (R. 15–20).

ernment courts with the United States courts of the Allied High Commission but the composition of these tribunals was not affected by the change in name, nor did it alter their criminal jurisdiction over dependents of members of the Allied forces. The courts of the Allied High Commission were at the time of petitioner's trial tribunals in the nature of military commissions conforming to the Constitution and laws of the United States. Accordingly, the tribunal which tried petitioner had jurisdiction to do so (R. 6–9).

The District Court discharged the Rule to Show Cause and dismissed the writ (R. 12, 34–36). Its order was affirmed by the Court of Appeals in a *per curiam* opinion (Pet. App. 1a).

ARGUMENT

Petitioner relies on the decision of this Court in *Reid* v. *Covert,* 354 U. S. 1, for the proposition that a Congressional grant of power to a court-martial to try American civilians in foreign countries is unconstitutional, and she deduces from this premise that, "If Congress could not constitutionally authorize the trial of civilian dependents for a capital offense overseas by courts-martial, it certainly could not constitutionally authorize the trial of civilian dependents for a capital offense overseas by a military commission, provost court, or other military tribunal" (Pet. 8).

These conclusions misconceive the import and the rationale of the *Covert* decision. It was there held that dependents of American servicemen cannot constitutionally be tried by court-martial when charged

with a capital offense in a country with which the United States is at peace. This conclusion does not help this petitioner, however, since in regard to the critical issue, that of the underlying political status of the American forces in Germany at the time of the offense and the trial, her situation was wholly unlike that present in the *Covert* case. Mrs. Madsen's trial took place at a time when the local government in Germany, while no longer a "Military Government," was "a government prescribed by an occupying power [which] depended upon the continuing military occupancy of the territory." *Madsen* v. *Kinsella,* 343 U. S. at 357. On the other hand, Mrs. Covert was tried in England and Mrs. Krueger Smith in Japan while the American forces were in those areas not by virtue of an occupation status arising out of the war but as friendly forces visiting pursuant to international agreement.[2] Because of this difference, the war powers of the Congress and the Executive, though not available in the latter situation, provide a firm legal basis for petitioner's trial by military court.[3]

In *Reid* v. *Covert,* Mr. Justice Black, in an opinion in which the Chief Justice, Mr. Justice Douglas, and

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[2] See separate concurring opinion of Mr. Justice Frankfurter in *Covert*, 354 U. S. at 42. The Treaty of Peace with Japan was filed September 8, 1951, and entered into force and effect on April 28, 1952—some one year or six months respectively prior to the trial in the *Krueger* case. See *United States ex rel. Krueger* v. *Kinsella*, 137 F. Supp. 806, reversed, 354 U. S. 1; Proclamation, 66 Stat. C31–32. Of course, there was no recent war between the United States and Great Britain, the situs of the offense and trial in *Covert.*

[3] See Mr. Justice Black's opinion in *Reid* v. *Covert*, 354 U. S. at 34–35; cf. Mr. Justice Clark's dissent, 354 U. S. at 81–82.

Mr. Justice Brennan concurred, referred to and made clear this distinction when he stated (354 U. S. at 35, fn. 63):

> *Madsen* v. *Kinsella,* 343 U. S. 341, is not controlling here. It concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with the Army or not.

Since petitioner relies solely upon the *Covert* decision as a basis for relief, the above-quoted language places her in the anomalous position of urging the Court to overrule its decision in her case on the basis of a subsequent opinion which confirmed both the effect and the rationale of that case.

Petitioner seeks to extricate herself from this dilemma by stating that the Court in *Covert* erred as to the true political status of the American forces in Germany, and the suggestion is made that an accurate picture with respect to this status has been revealed for the first time in connection with the present petition.

The fact is that petitioner's present point concerning the status of the American troops in Germany was presented in the same way when this case was before the Court in the previous *Madsen* case. On pp. 3–4 of the petition for writ of certiorari in *Kinsella* v. *Madsen,* No. 411, Oct. Term, 1951, petitioner pointed out, as here, that prior to her arrest and trial,

"military government and the military occupation of Germany, as such, had terminated" and that the German authorities had full legislative, executive and judicial powers, except only as limited by the Occupation Statute. Then, as now, the Government refuted petitioner's contention that military government and military law had ceased to function in Germany merely because new titles had been given to military government and to the military courts, and it asserted that, at the time of petitioner's offense and trial, the ultimate basis of authority in Germany was military conquest and continued military occupation.[4] That the Court recognized this situation is apparent from its statement, in answer to similar contentions as now advanced, that (343 U. S. at 360):

> It is suggested that, because the occupation statute took effect September 21, 1949, whereas the crime charged occurred October 20, 1949, the constitutional authority for petitioner's trial by military commission expired before the crime took place. Such is not the case. The authority for such commissions does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit

[4] For example, it is stated in respondent's brief in *Kinzella* v. *Madsen*, No. 411, October Term, 1951, at p. 69: "* * * the nature of the governmental functions and tribunals of the United States in Germany is to be determined from the source of their authority. That source has been military conquest, followed by a military occupation which has continued to date." This brief also provided on pp. 4–11 a chronology, history, and description of the American governmental and judicial system in Germany.

the occupying power to discharge its responsibilities fully.

And in a footnote (fn. 27) it was noted, quoting Winthrop, *Military Law and Precedents* (2d ed. 1920) 801, that the status of military government continues until the invader is expelled or abandons his conquest, or until, by treaty of peace, the country is restored to its original allegiance or becomes incorporated with the domain of the prevailing belligerent.

It is obvious, therefore, that nothing significant has been adduced now that was not known to and considered by the Court when it decided *Madsen* v. *Kinsella* in 1952 and *Reid* v. *Covert* in 1957. The fact that Article III of the Constitution and the Fifth and Sixth Amendments are, for the first time, specifically relied upon is of no consequence since in *Covert* the Court, having studied the constitutional questions involved in the trial of civilians abroad, concluded that there is no impediment to military trials in conquered areas such as those here involved. And the allegations in the habeas corpus petition that a state of peace existed between the United States and Germany and that military government and the occupation of Germany, "as such," had ceased to exist in April, 1949, are equally uncontrolling. Petitioner concedes that "no formal Treaty of Peace had been signed" and that units of the United States military establishment were still in parts of Germany (Pet. 11–12); she conceded in the Court of Appeals that the German government was subject to certain powers reserved to the Allied High Commission (Brief, p. 8); and she conceded in the petition for

writ of certiorari filed in the previous *Madsen* case that the court which tried her was "an occupation court" (Pet. in *Madsen* v. *Kinsella,* No. 411, Oct. Term, 1951, p. 35).

Moreover, respondent's return and answer to the rule to show cause in the instant case contested certain of petitioner's assumptions by referring in refutation to statements made in opinions rendered in the previous *Madsen* case (R. 6-9), and the District Court apparently regarded these references as denials of the allegations (R. 33). Finally, petitioner's allegations with respect to the legal-political status of the American military forces in Germany can hardly be deemed controlling, in any event, in face of the fact that this Court on two previous occasions ruled to the contrary,[5] and in face of the fact that, as a matter of law, it is plain that a state of peace did not exist between the United States and Germany during the relevant period. 66 Stat. C3; 65 Stat. 451.

[5] That this Court was then in possession of all relevant information is revealed not only by the most cursory perusal of the briefs filed in the previous *Madsen* case and in *Covert*, but also by the appendix to the *Madsen* opinion which contains a chronology of the events leading to the establishment of American military courts and their jurisdiction (343 U. S. 362–371).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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